Supreme Court, U.S.
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No. 92-1577

In The

Supreme Court of the United States

October Term, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. et al.,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

THE GROCERS SUPPLY COMPANY'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the ADEA plaintiffs' evidence was sufficient to avoid summary judgment.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Grocers Supply Company was the Defendant-Appellee in the court of appeals.

The Plaintiffs-Appellants in Case No. 91-2493 were Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr. and 126 additional individuals who opted in pursuant to 29 U.S.C. §216(b). Their names are listed below.[1]

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[1] Aaron Ben, Willis Ben, Glendon Felix Bertrant, Carl Boyd, Lenzie Burke Sr., Sylvester Burley, Leslie Campbell, Major Campbell, Willie Chatman, Sam Clark, L.C. Clayton, Samuel Clinton, Richard Coleman, Alvin Coney, Elijah Coruthers, Bruce Craft, Glen H. Craft, James E. Darby, Bill Davis, Jessie C. Davis, Charles Dease, Willie Deason, Jesse Doggett, Joe Douglas, William Drewy, Walter Ealcy, Donald Edwards, Edward Espree, Melvyn Finkelstein, Nelson Frank, James A. Garner, Arturo N. Garza, Marshall George, Herbert Gladney, Elbert L. Gooden, Ernest Grant, Allen Green, Costell Green, Dalfred Greene, Judge Greene, Lonnie Greene, Tom Greene, Wilfred Greene, James Greer, Vernon Gross, Larry J. Guillory, Edward Gums, Jr., Elbert E. Hailey, Turner Hall, Alfred Hamilton, Alfred Hamilton, Robert Hargrove, Leonard Harris, Willie Harris Jr., Joseph Henry, Edward Hernandez, James Hightower, James Hill, Carl Edward Hinton, Gilbert Hogan, Clarence Holloway Sr., Raymond Hooks, Eugene Hunter, W.L. Hunter, Sr., Clarence Ivory, Earnest L. Jackson, Emmerson Jackson, James Jackson, Leland Jackson, Leveari Jackson, Lorenzo Jackson, Richard Jackson, Talton Jacobs, Wheeler Johnson, Craig Jones, Floyd Jones, Marvin Jones, Roy Jones, Cardis L. King, Hillary Ladet, Curtis Landry, A.G. Lane Jr., Robert Latin, George Lee, Jerry Mack, Felix Martin, Aubrey McAfee Jr., Dan Meekins Sr., Clay Menifee, Jerome D. Minor, Robert Mosley, Harold E. Neal, Alvin Patterson, George Patterson, Freelon Payton, Bobby Pittman, Willie Readus, Curtis Richardson, Edward Rideout, Jerry Roach,

PARTIES TO THE PROCEEDING IN THE COURT BELOW – Continued

Additionally, in the court below this case was consolidated with Case No. 91-6043, styled *James E. Hamilton, et al. v. The Grocers Supply Company.*

R.L. Robins, Rollie Rogers, Milton Royer, Harvey Rusher, Harvey Rusher, Robert Sanders, James Scott, Murray Scott, Wilson Scott, Archie Searcy, Gary Don Seastrunk, James Simmons, LeRoy Smith, Manfred Spencer, James Thomas, Lloyd Tolivar, Kirby Veazie, Howard Washington, Robert Webster, K.T. Wheatfall, Alfred Whittington, Earnest Williams, Eldrid Williams, Thomas Williams, William Barlow Wright, Clarence Young, and Russell Young.

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Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et. seq.* ..... *passim*

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No. 92-1577

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STATEMENT OF THE CASE

This is an age discrimination case brought by a group of strikers who were denied reinstatement to their jobs at the end of their strike. The district court granted summary judgment for Grocers on two grounds: (1) the ADEA claims were preempted by the National Labor Relations Act; and (2) the lack of evidence presenting a

triable issue of fact concerning age discrimination. The Fifth Circuit affirmed on the latter ground.

REASONS FOR DENYING THE WRIT

There is No Conflict Among The Circuits on The Probative Value of Age-Related Comments in an ADEA Case.

The Fifth Circuit's decision below is fully consistent with other decisions not only from that circuit but also from other circuits.

Contrary to Britt's argument, a federal court is not compelled to grant a jury trial to every ADEA plaintiff who can produce an affidavit alleging an age-based comment. The Fifth Circuit has frequently approved summary judgment or judgment notwithstanding the verdict for ADEA employers despite the presence of such evidence. *See, e.g., Davis v. First National Bank of Killeen*, 976 F.2d 944, 950 (5th Cir. 1992), (plaintiff's jury verdict reversed despite evidence of repeated references to "old" employees); *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991), *cert. denied* ___U.S.___, 117 L.Ed.2d 495 (1992) (summary judgment affirmed despite comment that young new president should surround himself with people "his age"); *Neely v. Delta Brick and Tile Co.*, 817 F.2d 1224 (5th Cir. 1987) (*per curiam*) (comment that company "was bringing in new people and younger people" held insufficient to overturn j.n.o.v. for employer); *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 565 (5th Cir. 1983), *cert. denied* 467 U.S. 1215 (1984) (plaintiff's jury verdict overturned despite company president's statement that he wanted "new blood" and new "lean and

mean" marketing team); *Stendebach v. CPC Int'l, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982), *cert. denied* 461 U.S. 944 (1983) (statement that age might be relevant factor in reduction-in-force case held insufficient to create a jury issue); *Simmons v. McGuffey Nursing Home*, 619 F.2d 369, 371 (5th Cir. 1980) (summary judgment for employer affirmed despite evidence that board member had stated "we want a younger man").

Other circuits have done likewise, including two of the supposedly "conflicting" circuits cited in Britt's petition. *White v. Westinghouse Elec. Co.*, 862 F.2d 56 (3d Cir. 1988) (age comments insufficient to establish pretext); *Palmer v. United States*, 794 F.2d 534 (9th Cir. 1986) (summary judgment affirmed despite comments that employees were "getting too old"); *Parker v. Federal National Mortgage Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984) (summary judgment affirmed despite "preference for youth" comment); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980) (j.n.o.v. for employer affirmed despite comment that "division's future lay in its young Ph.D.'s").

Like any other evidence, age-based comments can occur in a wide variety of circumstances. The probative value of such comments may range from nil to highly incriminating, depending entirely on the context. For example: Was the statement made by a decision-maker? Did it refer to the plaintiff? Was the speaker joking or serious? Did it concern the employment decision at issue? Was it made before or after the employment decision? Was it an isolated statement, or repeated many times? Is the comment capable of an innocent construction? Is there any other evidence of age bias? All these questions,

and more besides, must be answered before an assessment of probative value can be made. The inquiry is intrinsically factual in nature.

The Supreme Court has already provided sufficient guidance to federal courts on how to evaluate statements which might reflect unlawful bias in job discrimination cases:

> [S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in that regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring.)

The record in this case reveals that all but one of the age comments relied upon by the Britt plaintiffs were made by non-decisionmakers, i.e., persons who were not involved in the decision whether to reinstate the strikers. The "new car/old car" comment attributed to Mr. Levit, who was a decisionmaker, was age neutral, because it simply compared the post-strike workforce with the pre-strike workforce, and did not refer to the chronological age of any employee. Therefore, the Fifth Circuit correctly held such comments were insufficient to create a jury issue.

Britt's petition does not raise any legal issue significant enough to warrant review by this Court under the standards set by Supreme Court Rule 10. The focus of the

Britt petition is a routine sufficiency of evidence question, which is inherently fact-specific. The Fifth Circuit has carefully reviewed the extensive record in this case and applied the correct legal standard in evaluating the plaintiffs' evidence. There is no need for this Court to repeat the exercise.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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